

F.B., Appellant

**U.S. POSTAL SERVICE, BUSH TERMINAL
POST OFFICE, Brooklyn, NY, Employer**

Appearances:

Case Submitted on the Record

Before:

JURISDICTION

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On May 25, 2018 appellant, then a 53-year-old customer service supervisor, filed a traumatic injury claim (Form CA-1) alleging that on May 15, 2018 she sustained an upper right arm injury and mental duress when instructing a postal driver of his duty assignment, he became aggressive and physical with her while in the performance of duty. She stopped work on that date. A supervisor checked boxes indicating that the injury was caused by appellant's willful misconduct, intoxication, or intent to injure self or another. The supervisor also noted that appellant had been "tapped on the shoulder by another employee."

In a narrative statement dated May 15, 2018, appellant explained that on that morning, while seated and surrounded by coworkers, she turned around in her chair to engage in conversation with Coworker T.W., regarding his duty assignment. She alleged that he did not like her answer regarding his duty assignment and that he stepped up to her chair to lean over towards her. Appellant felt intimidated as T.W. hovered over her. She stood to face him while he continued to dispute his duty assignment, invaded her space, and yelled at her. Appellant turned around to face the opposite direction because she felt T.W. was going to become even more aggressive towards her. T.W. then grabbed her by her upper right arm and tried to turn her around by force in a fit of anger. The coworkers in the room then ran to appellant's desk and pulled him away, after which she called the police emergency line.

In a witness statement dated May 25, 2018, T.G., a coworker, described the events of May 15, 2018. She stated that appellant was arguing loudly with an employee, K.D., about the use of a cellphone on the work floor. T.G. heard the commotion and went over. After she tried to calm the situation between appellant and the employee, T.W. approached the supervisor's desk for assistance. T.G. related that appellant began to speak to T.W. in a harsh manner and informed him of his assignment for the day. T.W. asked appellant what other assignments were open. T.G. recounted that appellant became "offensive and rude" with T.W. by stating that it was not his business. She alleged that appellant began to raise her voice at T.W. T.G. stated that appellant, who was seated, turned around in her seat and "jumped up" in T.W.'s face with her arms folded. She stated that she tried to stop both appellant and T.W. from "going back and forward" with each other. T.G. alleged that appellant was still in a defensive position when she quickly turned her body towards T.W.'s face while he was speaking to appellant in a disrespectful manner. She stated that she witnessed T.W. strongly tap appellant on her right shoulder "with force" and appellant turned her body away from T.W. at the same time. When appellant turned her body, T.W.'s hand fell off her shoulder, and T.W. grabbed her right arm. T.G. stated that appellant began to scream loudly that T.W. would be arrested because he had assaulted her.

In a statement dated May 15, 2018, T.W. alleged that he walked to a supervisor's desk seeking instructions for his route on that date. He recounted that appellant spoke to him aggressively about his orders, then jumped out of her seat to face him, which led to his backing up

in defense. Appellant folded her arms and turned her back to T.W., which he alleged caused her body and hair to brush against him “in the wrong manner.” T.W. alleged that he then touched her shoulder for her to turn towards him and asked her about her aggressive and disrespectful tone. Appellant and T.W. then “had words,” after which a manager asked him to walk away, which he did. In another statement of the same date, T.W. stated that, while he was waiting for his orders, appellant was hostile and arguing with another coworker. He stated his belief that her argument with other coworkers? was the reason she had become “negative” with him.

In a note dated May 17, 2018, Dr. Salvatore J. Contristano, a family medicine specialist, noted that appellant had been seen on that date and requested that she be excused from work from May 16 through 31, 2018, due to emotional distress. He stated that the emotional distress was from events that occurred on May 15, 2018 at her job site and that she was able to return to work on June 1, 2018. In a note dated June 1, 2018, Dr. Contristano requested that appellant be excused from work through June 24, 2018 due to emotional distress from the event that occurred on May 15, 2018 at her job site, noting that she could return on June 25, 2018. He extended the request through July 27, 2018 on June 25, 2018.

In a letter dated June 19, 2018, Fanegie Badette, a licensed mental health counselor, noted that appellant had attended therapy since May 22, 2018 on a weekly basis.

In a statement dated June 16, 2018, appellant noted that she had sought counseling multiple times for multiple incidents. She noted that from June 30 through July 2, 2015, a coworker had verbally and physically assaulted her, which resulted in a three-day hospitalization. Appellant alleged that on October 9, 2015 a driver for a private sector company assaulted her. She further alleged that a coworker assaulted her and threatened her life on January 8, 2016. Appellant stated that all these incidents occurred while in the performance of duty.

By decision dated July 9, 2018, OWCP denied appellant’s claim, finding that she had not established a medical diagnosis in connection with the incident of May 15, 2018 and that she had not established an accepted event that was a factor of employment. It accepted that she was a federal civilian employee who filed a timely claim and that the incident occurred as she described. OWCP explained that, while it had received evidence in the form of medical notes from Dr. Contristano, the notes only indicated disability from work due to emotional distress, which was not a valid medical diagnosis, but rather a symptom of a medical condition. It further stated that, even if medical documentation containing a diagnosis was submitted, appellant had not established an accepted event that was a factor of employment. OWCP accepted as factual, but not compensable, the incident of May 15, 2018 occurred involving her interaction with T.W.

In a work capacity evaluation for psychiatric/psychological conditions (Form OWCP-5a) dated June 27, 2018, Dr. Contristano stated that appellant was not competent to work eight hours per day due to severe emotional distress, but that she could work two hours per day in a reassigned position.

On September 12, 2019 appellant, through counsel, requested reconsideration of OWCP’s July 9, 2018 decision. Counsel argued clear evidence of error OWCP’s finding that there were no compensable factors of employment. He asserted that Board precedent established that any unwanted touching was a compensable factor of employment. Counsel stated that appellant did

not want her subordinate to grab her arm and noted that a witness had confirmed that T.W. had strongly tapped appellant's right shoulder and grabbed her right arm.

By decision dated September 24, 2019, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁷ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so

³ 5 U.S.C. § 8128(a); *see M.E.*, Docket No. 18-1497 (issued March 1, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁶ *See M.E.*, *supra* note 3; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *see also id.* at § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (February 2016).

⁹ *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *see Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Id.*; *see also Leona N. Travis*, 43 ECAB 227 (1999).

¹¹ *J.F.*, *supra* note 9; *Jimmy L. Day*, 48 ECAB 652 (1997).

as to produce a contrary conclusion.¹² This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³ To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁴

OWCP's procedures provide that the term clear evidence of error is intended to represent a difficult standard.¹⁵ The claimant must present evidence which on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁶ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁷

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. The last merit decision in this case was dated July 9, 2018. Appellant had one year from that decision to request reconsideration. As appellant's reconsideration request was not received until September 12, 2019, more than one year after the July 9, 2018 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the July 9, 2018 decision.¹⁸

The Board further finds that appellant has demonstrated clear evidence of error by OWCP in its July 9, 2018 decision.

In its July 9, 2018 decision, OWCP denied the claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis in connection with the accepted incident of May 15, 2018. It further found, however, that the accepted incident of May 15, 2018, which involved a coworker, T.W., tapping appellant on the right shoulder and grabbing her right arm, did not constitute an accepted event that was a compensable factor of employment.

The underlying issue in this case is, in part, for an emotional condition due to being subjected to unwanted physical contact by appellant's coworker, T.W. The initial question

¹² *Id.*

¹³ *Id.*

¹⁴ *J.F.*, *supra* note 9; *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ *Supra* note 5.

¹⁶ *P.H.*, Docket No. 19-1354, (issued March 13, 2020); *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

¹⁷ *See M.E.*, *supra* note 3; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁸ *See* 20 C.F.R. § 10.607(a) (a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought).

presented in an emotional condition claim is whether appellant has alleged and substantiated compensable factors of employment as contributing to her condition. Appellant has the burden of establishing by the weight of the reliable, probative, and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her federal employment.¹⁹ It is well established that unwanted physical contact may support a claim for compensation.²⁰ The evidence of record establishes that appellant's coworker, T.W., tapped appellant on the right shoulder and grabbed her right arm on May 15, 2018. He admitted that he tapped her on the shoulder in his statement and a witness statement from T.G. indicated that he grabbed appellant's right arm. Accordingly, as appellant's request for reconsideration is sufficient to shift the weight of the evidence and raise a substantial question as to the correctness of OWCP's decision, the Board finds that appellant has demonstrated clear evidence of error on the part of OWCP in its July 9, 2018 decision. Thus, OWCP abused its discretion in failing to reopen appellant's claim for merit review. The Board will reverse OWCP's September 24, 2019 decision and remand the case for an appropriate decision on the merits of her claim.

CONCLUSION

The Board finds that OWCP improperly denied her request for reconsideration of the merits of her claim.

¹⁹ *B.B.*, Docket No. 19-0682 (issued September 9, 2019).

²⁰ See *S.B.*, Docket No. 16-1522 (issued March 3, 2017); *Alton L. White*, 42 ECAB 666 (1991); see also *Mary J. Summers*, 55 ECAB 730 (2004); *Alice F. Harrell*, 53 ECAB 713 (2002); *Donna J. DiBernardo*, 47 ECAB 700 (1996).

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2019 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 23, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board